85-451

Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNION GAP IRRIGATION DISTRICT;
YAKIMA-TIETON IRRIGATION DISTRICT;
YAKIMA VALLEY CANAL COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. In 1945 the United States District Court for the Eastern District of Washington entered a consent judgment (herein sometimes referred to as the "1945 Judgment") in an action (herein sometimes referred to as "Civil 21") in which the users and holders of rights to approximately eighty percent of the waters of the Yakima River basin were joined. The court retained jurisdiction over matters of interpretation and relating to the administration of the judgment. In 1979 the District Court remanded an action for general adjudication of all surface water rights in the Yakima River basin to the appropriate Washington state court of general jurisdiction. Did the remand of the action for general adjudication to the state court, the McCarran Amendment (43 U.S.C; Section 666), and the principles of wise judicial administration require that the District Court in Civil 21, thereafter, in the exercise of its informed discretion, decline to establish and adjudicate for the first time, beyond what it held to be the scope of the 1945 Judgment, the existence for the preservation of fish life of a potentially overriding, treaty reserved right to the surface waters of that same Yakima River basin?

2. When the United States, as plaintiff, started Civil 21, it joined as parties to the action the users of approximately eighty percent of the waters of the Yakima basin. In its complaint it sought to obtain a declaration of its duties as "distributor" of water, and to establish, among other things, the interrelated and interdependent rights of the plaintiffs as against the defendants and of the defendants among themselves to the use of waters from a common source, the Yakima River.

Counterclaims by defendants sought a general adjudication. The 1945 Judgment was presented by the United States and consented to by all parties to settle all issues in the case. It declared the duties of the United States to distribute water from the river to all the parties, to others and (in fulfillment of a Congressionally modified Yakima Indian treaty reserved right to water from the Yakima River) to the Yakima Indian Reservation for distribution by an agency of the United States government, namely the Wapato Indian Irrigation Project, an arm of the predecessor of the Bureau of Indian Affairs. Is the United States, because of these proceedings, precluded from asserting, thirty-five years later and contrary to the judgment, a claim to a Yakima Indian treaty reserved water right with priority overriding rights recognized in the consent judgment?

3. Is the 1945 Judgment to be given a res judicata effect as between the parties to Civil 21, including the United States, even though Civil 21 was not a general adjudication of all surface water rights in the Yakima River basin?

4. Where the United States, in its trust and supervisory capacity for the Yakima Indians, participated in Civil 21 and presented the 1945 Judgment for entry by the District Court, does the judgment which was expressly made without prejudice to claimants to water who were not parties, preclude the U.S. from asserting, thirty-five years later and on behalf of those same Indians, a treaty reserved water right with a priority ahead of virtually all, if not all, rights recognized in the earlier judgment?

5. Is the Yakima Indian Nation, whose rights the United States represented in Civil 21, likewise bound although it was

not joined and did not directly participate in the proceedings leading up to entry of the 1945 Judgment?

PARTIES TO THE ACTION

This action involves the petitioners Union Gap Irrigation District, Yakima-Tieton Irrigation District, Yakima Valley Canal Company, as well as the Sunnyside Valley Irrigation District, Roza Irrigation District, the State of Washington and the United States of America. It also involves several irrigation districts and others who are not parties to this appeal, namely Kittitas Reclamation District, Selah & Moxee Irrigation District, Sunnyside Valley Irrigation District, Roza Irrigation District, Grandview Irrigation District, Grandview Irrigation District, Granger Irrigation District, Prosser Irrigation District, Snipes Mountain Irrigation District, Benton Irrigation District, Zillah Irrigation District, Broadway Irrigation Co., Moxee Ditch Co., Sub-A, Naches-Selah Irrigation District, Terrace Heights Irrigation District, Westside Irrigation Co., Outlook Irrigation District, Cascade Irrigation District, Confederated Bands & Tribes of the Yakima Indian Nation. In fact, the several irrigation districts and canal companies in turn represent hundreds if not thousands of water users in the Yakima basin who have not been individually joined either before the District Court or the Court of Appeals.

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OPINIONS BELOW

The amended opinion by the United States Court of Appeals for the Ninth Circuit was filed June 14, 1985, and is reported at 763 F.2d 1032. Earlier (unpublished) opinions were filed on September 10, 1982, and February 6, 1985. Appendix p. 16, and p. 36. Both opinions have been replaced. The decision of the District Court is embodied in its unreported Instructions to the Watermaster dated October 31, 1980, and Supplemental Instructions to the Watermaster dated November 28, 1980. The Instructions to the Watermaster by the District Court were not published and are reproduced in the Appendix, pp. 54, 61.

JURISDICTION

The Amended decision of the United States Court of Appeals for the Ninth Circuit was entered June 14, 1985. A petition for certiorari is therefore due September 12, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rule 17.1 of this Court.

STATUTES AND TREATIES INVOLVED

1. The Act of August 1, 1914 (38 Stat. 582, 604 herein the "1914 Act") is reproduced in the Appendix (App. 70).

2. 43 U.S.C. § 666(a) (66 Stat. 560) is reproduced in the Appendix. (App. p. 74).

3. The Act of July 1, 1940 (54 Stat. 707. herein the "1940 Act") is reproduced in the Appendix. (App. 75).

4. The Treaty with the Yakimas is reproduced in the Appendix. (App. 76).

STATEMENT OF THE CASE

BACKGROUND.

The Union Gap Irrigation District, Yakima-Tieton Irrigation District and Yakima Valley Canal Company divert surface waters for irrigation in the Yakima River basin in the State of Washington. They hold water rights typical of those held in the basin. Those rights have been governed for over 40 years by a consent judgment entered in this case by the United States District Court for the Eastern District of Washington on January 31, 1945 (herein the "1945 Judgment").

The Yakima River basin contains approximately 6,000 square miles (an area larger than the State of Connecticut) and almost all of Kittitas and Yakima Counties and one-half of Benton County.[1] See Map reproduced opposite footnote p. 30. The basin extends 175 miles from the crest of the Cascade Mountain range to the confluence of the Yakima and Columbia Rivers near Kennewick, Washington.[2]

The basin is in the rain shadow of the Cascade Mountains.[3] Average rainfall is about 7". The months of July and August are particularly dry, receive less than 5% of the total annual precipitation and commonly include periods of four to six weeks without any rain.[4] Most of the annual precipitation occurs in the winter.[5] Seventy-five percent comes in the months of October through March.[6]

The average annual runnoff is approximately 2.6 million acre feet. It usually drops to its lowest point in August.[7] Ninety-two percent comes from the Cascade Mountains.[8]

Irrigation in the Yakima Basin began before the turn of the century. By 1905, the natural flow of the Yakima River was fully

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* *Footnotes are on pages 28-30 hereto.*

appropriated and used. Some 125,000 acres were irrigated (about 25% of present development).[9]

Without storage reservoirs the flows in the Yakima River basin could not meet late summer irrigation demands.[10] Investigations to develop water storage and distribution facilities were begun about 1903 by the United States Reclamation Service.[11] Pursuant to legislation specifically adopted for that purpose, § 90.40.030 RCW (Laws 1905 ch 88 § 3), the United States, acting pursuant to the Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* (32 Stat. 388), filed a withdrawal of all the unappropriated waters of the Yakima River and its tributaries, holding them for irrigation.[12] Six dams and reservoirs in the Cascade Mountains to store 1,070,000 acre feet of water were begun in 1909 and completed in 1933.[13] They store water in the winter and spring for release during the summer.[14]

The surface waters of the Yakima basin are fully appropriated. No further natural flows or storage waters are available without additional storage.[15]

The largest single district in the project is the 140,000 acre Wapato Irrigation Project operated by the Bureau of Indian Affairs.[16] The area irrigated within the Yakima Indian Reservation is greater than the entire area irrigated in the Yakima basin prior to the construction of the Yakima Project.[17] Approximately 55% of this irrigated reservation land is held in trust by the United States.[18]

The Yakima basin contains about one-third of the irrigated land in the State of Washington, about 500,000 acres.[19] Over 400,000 acres are served by the Yakima Project.[20] By 1981, the Yakima Project contained over 12,000 farms, a farm popula-

tion of over 38,000 people, and a total population of approximately 175,000 people.[21] The entire population is largely dependent upon the agricultural economy of the area.

Sixty kinds of fruit, vegetables, seed, grain, forage and specialty crops are produced in Yakima County alone.[22] Of the 3,072 counties in the United States, Yakima county ranks first in the production of apples, mint and hops and fifth in overall agricultural production.[23] The gross value of crops produced in the Yakima Project in 1981 was approximately 370 million dollars.[24]

THE 1906 LIMITATION ON INDIAN DIVERSIONS

In 1905, when investigation of the Yakima Project under the Reclamation Act of June 17, 1902, 43 U.S.C. § 372 *et seq*, 32 Stat. 388, began, it was planned to store and release the largest possible portion of the waters of the basin contemplating the fullest possible development in the future. The lands of the Yakima Indian Reservation were included in the plan. The Yakima River was overappropriated and the conflict between the United States in its capacity as trustee for the Yakima Indians and non-Indian water users over rights to use of water in the Yakima basin had already reached the courts.[25] For the plan to succeed all inconsistent claims had to be eliminated. Accordingly, approval of the project depended upon satisfaction of certain conditions, affecting the Yakima River or any other body of water necessary for irrigation of lands within the project.

Conflicting claims to water for irrigation, power or any other purpose were to be adjusted. Suits to prevent diversions to the Indian reservation were to be terminated. Any and all

"difficulties, conflicts, litigation, complications or controversies" tending to restrict or embarrass appropriations of water for the project were to be settled, terminated and disposed of. The project was to be clean, feasible and free of difficulties or complications before any money was spent.[26] [27]

To satisfy these conditions, three major steps were taken. Flows of 650 and 147 cubic feet per second, respectively, were allotted by the United States to the Sunnyside Canal and to the reservation. These quantities were much less than was claimed and operated most effectively toward obtaining the consent of the other non-Indian water users to limit their claims proportionately. Those claiming 94.5% of all waters claimed by the non-Indian irrigation canals agreed to limit their diversions to actual diversions made during August 1905. The canals which failed to sign limiting agreements were relatively unimportant.[28]

On March 28, 1906, it was determined that the conditions had been satisfied and commencement of the project was authorized.[29]

THE 1914 ACT

The 147 c.f.s. flow allocation to the Yakima Indian Reservation created much controversy and dissatisfaction,[30] and conflict in Congress from approximately 1909 to 1914.[31] Congress directed the Secretary of the Interior to investigate the situation and devise a plan to provide water for the reservation. Indian Appropriation Act of August 24, 1912. The Yakima Tribe sent a Memorial to Congress contending that it owned one-half of the Yakima River and all of the water on the reservation, threatened to bring suit in federal court to settle

their water rights, and cited the decisions in the cases of *Winters v. U.S.*, 207 U.S. 564 (1908) and *Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir., 1908).[32]

In 1913 Congress created a joint commission to investigate the need and feasibility of getting storage waters "for the reclamation of the lands on said reservation, and for the use and benefit of the Indians of said reservation."[33] [34]

The joint commission conducted hearings and reported at length to Congress.[35] It was trying to settle the whole dispute as to water rights in the Yakima basin,[36] [37] and to get water for the Indians and the reservation.[38] [39] [40]

Congress was well aware of the existence of the doctrine of *Winters v. U.S.*, 207 U.S. 564 (1908).[41] It was discussed repeatedly in testimony before the joint commission,[42] and frequently and extensively in the debates on the appropriation bill.[43] It was told that the reservation was established to settle the Indians as an agricultural people.

By 1914 all of the irrigable lands of the Yakima Reservation had been allotted.[44] It was contended that the Indians' needs could be met with twenty acres of irrigated land per person. The joint commission, however, settled on irrigation of forty acres on each allotment.[45] Congress agreed. 38 Stat. 604. It enacted § 22 of the Act of August 1, 1914, 38 Stat. 604, which in part provided water from storage and limited the rights of the Indians to water from the Yakima River:

> [T]he Secretary of the Interior is hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred fourty-seven cubic feet per second heretofore allotted to said Indians, so that there

> shall be, during the low water irrigation season, at least seven hundred twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of the Yakima River and adequate for the irrigation of forty acres on each Indian allotment; . . .

THE 1940 ACT

The water rights guaranteed to the reservation by the Act of August 1, 1914, were later supplemented by an additional 100,000 acre feet per year. Act of July 1, 1940, 54 Stat. 707. This additional water was to be provided in accordance with the purpose of the August 1, 1914 Act.[46] Because the flow of water in the Yakima basin had been brought under control by storage for the Yakima Project, additional water which could have been diverted for the reservation was no longer available. The 720 second feet of flow had become the maximum as well and the minimum available. Congress authorized the additional 100,000 acre feet for the forty acre allotments provided for by the 1914 Act.[47] In the course of debate on the 1940 Act Representative Schafer of Wisconsin explained:

> [W]e found that these Indians had a valid interest and title to water rights in the Indian Reservation. Under a reclamation project the Government of the United States promised these Indians under a solemn, binding treaty, and under an act of Congress enacted August 1, 1914, that it would furnish sufficient water to them in payment of those water rights to adequately irrigate all forty acre allotments on the Indian Reservation. It has been found that the Indians have not received sufficent water to do that and this bill provides sufficient water . . . The bill merely executes the contractual obligations of Uncle Sam with his Indian wards. These Indians need that water and

> they are entitled to it under the law. I hope the gentlemen will not oppose this . . . so that Uncle Sam can keep faith with his Indian wards under his treaty obligations and the provisions of existing law.

Cong. Rec. 8414 (June 17, 1940).

UNITED STATES' CONTRACTS TO DELIVER 'SURPLUS' BASIN WATERS

In 1911 Congress enacted the Warren Act which authorized the Secretary of the Interior to enter into contracts for water in excess of that needed for project lands. A first right for project lands, such as those in the Sunnyside Valley and Yakima-Tieton Irrigation Districts, was preserved. 43 U.S.C., 523 *et seq.*, Act of February 21, 1911, 36 Stat. 925.

After the 1914 Act and before the 1940 Act was adopted, the United States entered into Warren Act contracts for "excess" waters with three non-Indian districts, and, notably, the U.S. Indian Service for the reservation for yearly delivery of a total of 945,000 and 1,347,000 acre feet of such waters by 1921 and 1936, respectively.[48]

CIVIL 21.

On October 12, 1939, the United States, as plaintiff, commenced this lawsuit in the United States District Court for the Eastern District of Washington (herein referred to as "Civil 21"). E.R. 2. The case grew out of a long-standing dispute between the Sunnyside Valley Irrigation District and the Bureau of Reclamation. The United States' complaint, however, was not so limited. It alleged that the plaintiffs, the defendant and water users of the project had interrelated and interdependent water rights from a common source, and that in low water years no more water was available than needed to fulfill water supp-

ly contracts. E.R. 14, 15, 20, 21. It also alleged that lands, orchards, homes, towns, roads, schools and other features valued then at more than $10,000,000.00 and an increase in population of the Yakima Valley of from 35,000 to 100,000 people largely dependent upon the project had occurred in reliance on project water rights. E.R. 22, 23.

The United States asked the District Court to declare its rights and the rights of other plaintiffs against the defendants, and the rights of the several defendants against each other. E.R. 29(d)(e). Any condition precedent to these broadly-stated prayers for relief were satisfied by the decision in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir., 1943) *cert. den.* 320 U.S. 792.

Consistent with the relief requested by the United States, several defendants asserted counterclaims requesting the joinder and adjudication of the rights of all users of waters of the basin. E.R. 53, 54, 59, 60, 66. Thus, the case included the issue of a general adjudication of the water rights of the basin. Statement to the Court, p. 1; E.R., page 107; Appendix, p. 91.

On January 31, 1945, following intensive efforts by the United States to bring about a settlement, a Consent Judgment (herein the 1945 Judgment) was presented by the United States and entered by the District Court.

The 1945 Judgment states that the United States and the other parties had settled all issues in the case and that it represented the agreement of the parties as to those issues. 1945 Judgment, p. 1; E.R. 117; Appendix, p. 111. Attorney Chaffee, representing the Sunnyside Valley and Yakima-Tieton Irrigation Districts stated on the record, in open court without contradiction by the several counsel who were present for the

United States, that the judgment:

> [C]overs the situation quite completely, and, in effect there is an adjudication of the water rights of the Yakima River and its tributaries.

Colloquy with Judge Schwellenbach, January 31, 1945, pp 23-24; Appendix pages 205.

The judgment was, indeed, comprehensive. Its coverage provided for allocation of 80% of the total diversions of surface waters of the Yakima basin to the twenty-one parties, including the United States, and, with the provision in paragraph 19 for certain other water rights, recognized and provided for delivery of 89% of such diversions.[49]

The 1945 Judgment specifically mandated that the United States deliver the 720 cubic feet per second of water in perpetuity for land within the Yakima Indian Reservation pursuant to the Act of August 1, 1914, 38 Stat. 582, and 100,000 acre feet in accordance with the Act of July 1, 1940, 54 Stat. 707. 1945 Judgment, ¶ 4, pp. 13, 14; E.R. 129, 130; Appendix p. 141. The 720 second feet of water was exempt from proration in case of shortage. 1945 Judgment, ¶ 19, p. 27; E.R. 143; Appendix p. 177.

Mr. Veeder of the Department of Justice and representing the Indian interests assured the court when the judgment was entered that all the Indian rights were under the Wapato Division and paragraph 4 of the 1945 Judgment. Colloquy, pp. 17-18; Appendix, p. 192. He also assured the court that the judgment and all its articles had been reviewed and approved by the Department of the Interior, which represented the Indian Service, and that the Department of Justice represented the Indian Service. *Id.;* Appendix, p. 193.

Counsel for the United States conceded in the October 29, 1980 proceedings that the United States, in 1945, was representing the Wapato Project as an arm and instrumentality of the Indian Service created to enable it to discharge its trust and supervisory responsibility with regard to Indians, but not "directly" representing all or any of the interests of the Yakima Indian Nation. October Transcript, pp. 49, 50. He then recanted as to the representation of the Tribe, stating:

> Obviously the Bureau of Indian Affairs was attempting to protect the Yakima Nation, and they were trying to act in their best interests but in the sense of saying did he represent the Yakima Indian Nation, and the answer is no, he did not.

October Transcript, p. 50.

At the October 29, 1980, hearing the District Court appeared to recognize that Indian irrigation rights were represented by the United States in Civil 21, but felt that the issue of water for fish was not disposed of then. October Transcript, pp. 65, 74-77.

The 1945 Judgment, as between the parties, declared their respective water rights as to times and quantities to be delivered, and established a relative priority between them by providing that in time of shortage certain parties or rights would share the shortage proratably while other parties and rights would not be subject to proration. 1945 Judgment, ¶ 18, 19, pp. 26-29; E.R. pp. 142-145; Appendix p. 181; Statement to the Court, pp. 2, 8, 9; E.R. p. 108, 114, 115; Appendix, pp. 92, 105,-9.

The intent that the 1945 Judgment be a final determination as between the parties is expressed in paragraph 20 of the judg-

ment. There the judgment is stated to be a final determination of the duty of the United States to deliver water from the Yakima River and its tributaries, from storage and other sources to the parties and to lands within the Wapato Indian Irrigation Project. Further, the United States, along with all of the other parties, was forever enjoined from asserting any claim to or interfering with any of the rights to use or delivery of the quantities recognized in the judgment. 1945 Judgment, ¶ 20, p. 29; E.R. p. 145, Appendix, p. 181; see also Statement to the Court, pp. 2, 9; E.R. p. 108, 115; Appendix, pp. 92, 109.

The rights of certain non-parties whose rights had previously been recognized by the United States were recognized and exempted from proration but without prejudice to the rights of the parties. 1945 Judgment, ¶ 19, pp. 27-29; E.R., p. 143, 145; Appendix, pp. 180, 181. The rights of parties versus non-parties generally are not to be prejudiced by the judgment. 1945 Judgment, ¶ 20, pp. 29-30; E.R., p. 145, 146; Appendix, p. 182.

When the judgment was entered counsel for the United States represented to the court that the non-parties referred to in paragraph 20 were "such parties or users who are not within the jurisdiction of the court in the present proceeding." Statement to the Court, p. 9; E.R., p. 115; Appendix, pp. 109, 110.

Finally, the District Court retained a limited jurisdiction over matters of interpretation and administration of the judgment. 1945 Judgment ¶ 20, p. 30; E.R., p. 146; Appendix, p. 183. Counsel stated that jurisdiction was retained "so far as essential for proper administration." Statement to the Court, p. 2; E.R., p. 108; Appendix, p. 92.

THE STATE GENERAL ADJUDICATION OF THE YAKIMA BASIN

In October 1977, the State of Washington began an action in Superior Court for Yakima County, Washington (Cause No. 77-2-01484-5) pursuant to Chapter 90.03 of the Revised Code of Washington for a general adjudication of the surface waters of the Yakima River basin (herein "Acquavella"). *Department of Ecology v. Acquavella,* 100 Wn. 2d 651, 674, P.2d 160 (1983). Over 4,000 defendants, representing in excess of an estimated 40,000 individual water users were served. By September 1, 1981, over 2,100 claims had been filed in the state court proceedings. *Department of Ecology v. Acquavella, supra.* Those claims included claims by the United States on behalf of the Yakima Indian Reservation asserting the treaty reserved water rights of the Yakima Indians.

In the meantime, on November 25, 1977, the state general adjudication action was removed to the United States District Court for the Eastern District of Washington, Civil No. C-77-347. By an order entered January 12, 1979, the District Court remanded the case to the Washington state court on the basis of the policy of the McCarran Amendment, 43 U.S.C. Section 666, as interpreted by *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

On April 13, 1982, a United States' motion in state court to dismiss was denied on the ground that the action was for a general adjudication and the United States was, accordingly, a proper party defendant and the court had jurisdiction to hear and determine claims for reserved treaty water rights of the Yakima Indian Nation.

The state court proceedings have continued to this date.

THE REQUEST FOR INSTRUCTIONS AS TO RELEASE OF STORAGE WATER TO PRESERVE FISH

On April 26, 1977, the District Court acting under paragraph 20 of the 1945 Judgment appointed William G. Gray, the superintendent of the Yakima Project, as Watermaster.

In the fall of 1980, approximately 60 salmon redds (nests of salmon eggs) were discovered in a stretch of the Yakima River in locations where they would be left dry and die if water were stored for the 1981 irrigation season in the usual way. November Transcript Vol. 2, 109. In response to a request by the Yakima Indians, Gray on October 28, 1980, sought instruction from the District Court whether he should store water for irrigation or release it to save the salmon eggs. E.R. 147.

The District Court held a hearing on Gray's request on October 29, 1980. The parties received about one and one-half days notice of the hearing. See, for example, October Transcript 102, 57, 64, 66, 109. At the outset, the court took the position that unless there was a specific abrogration or rescission of the Treaty fishing right with provision for just compensation, the treaty right had priority over the rights recognized in the 1945 Judgment. October Transcript 19. The question was one of priority between the rights recognized in the 1945 Judgment and the treaty right to water for fish, October Transcript 63-64. The Court stated that fishing right was not disposed of or abrogated in 1945. October Transcript 76-77. It ruled that the Watermaster was to maintain a minimum flow in the river adequate to maintain the salmon redds pending an evidenciary hearing to be held a month later. October Transcript 102, 115. Instructions to Watermaster, October 30, 1980. E.R. 160. App. p. 59.

At the next hearing on November 25 and 26 in Spokane, Washington, the District Court refused to enter into any consideration of the questions relating to the validity or priority of the Tribe's treaty right to water for preservation of the salmon redds. It continued to recognize the priority of the use of water for the salmon redds over storage for irrigation. November Transcript Vol. 2, p. 161-165; Supplemental Instructions to Watermaster, November 28, 1980, E.R. 171. App. pp. 66, 67.

The Court of Appeals confirmed these instructions, ultimately, by its amended opinion of June 17, 1985. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District,* 763 F.2d 1032 (9th Cir., 1985). It said that because the 1945 Judgment was not intended to be a general adjudication and the factors articulated in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) were not present, the District Court was not required to dismiss in favor of the state general adjudication. 763 F.2d at the 1034-1035. It also held that because the 1945 Judgment was not a general adjudication and did not adjudicate treaty rights of the Tribe, the irrigators' res judicata arguments were rejected. 763 F.2d at 1035. Finally, it upheld the instructions to the Watermaster as reasonable emergency measures in the exercise of the discretion of the District Court. 763 F.2d at 1035.

A. The Special Importance of This Case.

The Ninth circuit has, once again, rendered a decision with dangerous potential to unsettle established water rights throughout the west. Water is essential to the survival of the people and the economies of the desert west. Throughout the region rights to use of water are in potential conflict with

federally reserved rights, particularly Indian reserved water rights.

In the early twentieth century conflicts between Indian reserved and state water rights were in an unknown number of instances resolved by consent judgments negotiated and entered by the United States on behalf of Indian tribes that, typically, were not parties to or directly represented as parties. Earlier adjudications also may have directly involved less than all of the water rights of the stream systems in question.

The June 14, 1985 decision of the Court of Appeals threatens to unsettle, and by virtue of the early priority and lack of quantification of Indian reserved water rights, jeopardize previously settled water rights. The jeopardy extends not only to state rights existing at the time of settlement but all subsequent development based on state law water rights. The decision threatens not only the economy and population of one of the most productive agricultural areas in the United States, but also, precedentially, the stability and certainty of water rights elsewhere in the west based upon such negotiated consent judgments.

The decision should be reversed because it disregards well-grounded rules developed by this court as to the policies of the McCarran Amendment, 43 U.S.C. § 666, res judicata in partial as well as general adjudications of water rights, and the representation of Indian interests by the United States.

B. Basis of District Court Jurisdiction.

The jurisdiction of the District Court was based on the predecessor of 28 U.S.C. § 1345 and the jurisdiction it retained solely to interpret and administer the consent judgment entered

in this case January 31, 1945. 1945 Judgment, ¶ 20, E.R. 146, App. p. 183.

ARGUMENT

THE BASIC CONFLICTS WITH THE LAW AS ESTABLISHED BY THE UNITED STATES SUPREME COURT

1. THE DOCTRINE OF WISE JUDICIAL ADMINISTRATION.

The rulings of the District Court and the Court of Appeals violate the principles of wise judicial administration as established by this Court in *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 103 S. Ct. 3201, 3206, 2315, (1983); *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 816-820 (1976). *(Akin)*

The Court of Appeals ruled that Civil 21 was not a general adjudication and the 1945 Judgment did not implicate the treaty reserved water rights of the Yakima Indians.

The District Court did not merely interpret the 1945 Judgment in 1980. It went on to partially adjudicate a newly-asserted treaty reserved water right with priority superior to all irrigation water rights recognized in 1945. The issue was not marginal, but went to the heart of the state general adjudication.

The 1979 remand of *Acquavella,* established the presence of the *Akin* factors and held that wise judicial administration required the adjudication of Yakima River basin water rights in state court. It established that Washington had a comprehensive system for adjudicating water rights which would lead to a general, unified water rights adjudication and extensive

involvement of state water rights. It set proceedings in Yakima in the center of the river basin, rather than remotely in Spokane.

By October, 1980, the state court proceedings had been underway for almost three years. Over eighteen months had passed since the case had been remanded. The state case has proceeded since then with the active participation by the United States on behalf of the reserved water rights of the Yakima Indians.

At the October 29, 1980 hearing, the irrigators had little advance notice, but the principals of the *Akin* case and the remand of *Acquavella* were called to the attention of the District Court. October Transcript 78-84, 97. This new federal proceeding in Civil 21 to adjudicate the treaty reserved water right for fish was not so far advanced then as to preclude its deferral to the state court.

The Court of Appeals justifies retention by the District Court because Civil 21 was not a general adjudication. That rationale would exempt federal piecemeal adjudication of water rights from the *Akin* doctrine after any remand. 763 F2d at 1035. It departs fundamentally from rulings in *Arizona v. San Carlos Apache Tribe*, 562 U.S. 545, 103 S. Ct. 3201, 3206, 3215 (1983); *Colorado River Water Conservation District v. United States* 424 U.S. 800, 816-820 (1976).

2. THE RULE OF RES JUDICATA

Neither the United States nor either of the lower courts concede that the doctrine of res judicata applies in any relevant way to the United States in this acton. They disregard the actual participation by the United States in Civil 21 and the importance of the doctrine especially in the case of water rights.

The Court of Appeals, in a particularly egregious way, repudiates the general policy of the rule of res judicata as adopted by this court by denying any res judicata effect to the 1945 Judgment on the ground that Civil 21 was not a general adjudication.

Finally, the long-established rules governing the res judicata effect of participation by the United States in actions involving Indian interests are disregarded on specious, and narrow grounds which ignore the decisions of this court.

The continued disregard of these salutary principles undermines the economy and people of the Yakima basin who are almost entirely dependent upon reliable water rights for their existence and threatens others in the west who are similarly situated.

a. Res Judicata, Generally and in Water Right Cases.

The contention of the United States and rulings of the District Court and the Court of Appeals that there is a super priority, reserved, instream right to use of storage waters for the migration and spawning of salmon do not stand in light of the participation by the United States in Civil 21 and the express incorporation of the Tribe's Congressionally modified treaty reserved water right under the Act of August 1, 1914 into the 1945 Judgement.

These Petitioners do not contend that Article III of the Treaty with the Yakimas has been abrogated; only that any reserved right to use of the surface waters which might be implied from the treaty fishing right has been limited by the specific dealing by the United States with the use for irrigation of all waters of the Yakima basin, particularly in the 1945 Judgement.

The overriding intent of the United States from the outset of its project to develop the Yakima River basin for irrigation was that the project would operate free of claims which could embarrass it. Development has proceeded in reliance on that policy. The United States should, therefore, provide substitute means to satisfy the treaty fishing rights without repudiating its long-standing commitment (approximately eighty years) for the irrigation of the Yakima River basin. It, however, has, instead chosen to burden, impair and take the water rights of farmers.

When it adopted the Act of August 1, 1914, the Congress only partially repudiated the act of the Secretary in 1906 limiting Indian's water rights. Quantification at 147 second feet was repudiated, the concept of limitation ratified. Thus, the guaranteed flow was increased to 720 second feet, free of storage charges, but the limitation was adopted by the insertion into the legislation of language declaring that the provision of the additional water was "considered as equivalent to and in satisfaction of the rights of the Indians in the low water flow of the Yakima River." 38 Stat. 604. Further, Congressional ratification is found again in 1940 when the 720 second feet of water was recognized as a maximum as well as a minimum supply of the modified treaty water right and Congress raised the limit by 100,000 acre feet per year. Act of July 1, 1940, 54 Stat. 707, Appendix, p. 75.

The limitations inherent in the Acts of 1914 and 1940 are incorporated by the United States into the 1945 Judgment. If its intent were that other claims be preserved the United States should have asserted them then.

Because Civil 21 dealt with property rights, the water rights of the parties, *Ickes v. Fox*, 300 U.S. 82 (1937), there was a clear need for final resolution of all claims before the court. The parties were, therefore, obliged to advance in Civil 21 every claim of title arising out of events which had occurred before the suit was started. *Northern Pacific Railway v. Slaght*, 205 U.S. 122 (1907); *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1903) (United States as trustee for Kalamth Indians precluded by judgment in an action brought earlier by the United States on its own behalf); *Hatchitt v. United States*, 158 F. 2nd 754 (9th Cir., 1946).

In 1945 the United States may have (see the provision in paragraph 17 of the judgment for minimum flows of water for fish life) and certainly might have raised its claim that the treaty reserved water rights of the Yakima Indians included that right to take water from irrigation storage for the benefit of fish life in the basin. In any case, under the general rule that all claims which were or might have been raised are precluded, the latter day claim by the United States to the use of additional water for fish life is precluded by the 1945 Judgment. *Nevada v. United States*, 462 U.S. 110, 103 S. Ct. 2906 (1983); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Commissioner v. Sunnen*, 333 U.S. 591, 597, 598 (1948). The claims in the case were, at least between the parties, sufficiently broad to require the United States to raise the issue.

When it started Civil 21 the United States waived its sovereign immunity as to claims which might be asserted in the action by defendants in recoupment arising out of the same transaction or occurrence that was the subject matter of its

claim. Defendant's counterclaims were permitted to the extent necessary to defeat the claims of the United States. *United States v. Fidelity & Guarantee Co.,* 309 U.S. 506 (1940) citing *Bull v. United States,* 295 U.S. 247, 261 (1935). The United States consented by implication to the full and complete adjudication of all matters reasonably incident to its lawsuit. *Lukenback v. The Thekla,* 266 U.S. 328, 339, 340 (1924); *United States v. Martin,* 267 F.2d 764, 769 (10th Cir., 1959). The District Court in 1945 had jurisdiction to entertain claims for a general adjudication not only because of the ruling in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir., 1943) *cert. den.* 320 U.S. 692, but because the rights of the parties and the rights of others users of water from the Yakima system which the United States expressly asked the court to determine were so interrelated and interdependent. *New Mexico, ex rel. Reynolds v. Molybdenum Corp.,* 570 F.2d 1364 (10th Cir., 1978). See the complaint. E.R. 14, 15, 20, 21, 22, 23, 26, 27, 29.

When the 1945 Judgment was presented for entry the United States admitted that an adjudication of the Yakima River was necessitated by the counterclaims. E.R. 107.

The Court of Appeals has, once again, forgotten that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time. It is a rule of fundamental and substantial justice, of public policy and private peace which the court should cordially regard and enforce. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, (1981). Nowhere is this more apparent or important than in the area of water rights in the desert west. *Arizona v. California,* 460 U.S. 605, 103 S. Ct. 1382, 1391-1395 (1983). In

that case this court decided that the rules of preclusion should inform its decision although those rules were not strictly appliable. "Certainty of rights is particularly important with respect to water rights in the Western United States." 103 S. Ct. at 1392. The recalculation of the Yakima treaty reserved water right at this late date would bring with it destructive consequences of the type envisioned by this court when asked to recalculate irrigable acres under the standard adopted in the *Arizona* case:

> Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to the states of the southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado river system. 'In the arid parts of the West . . . claims to water for use of federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.' *United States v. New Mexico*, 438 U.S. 696, 699, 98 S. Ct. 3012, 3013 (1978). If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon" reduction in the amount of water available for water-needy state and private appropriators. *Id.*, at 705, 98 S. Ct. at 3016. As Special Master Tuttle recognized, 'not a great deal of evidence is really needed to convince anyone that western states would rely upon water judications.' Tuttle Report at 46. Not only did the Metropolitian Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocations cannot help but exacerbate potential water shortage problems for these projects and their States.

103 S. Ct. at 1392-93.

b. The Alleged Requirement of General Adjudication.

In a classic *non sequitur* the Court of Appeals reasoned from the decision of this court in *Nevada v. United States,* 463 U.S. 110 (1983) (which did not so hold) that because Civil 21 was not a general adjudication, the 1945 Judgment was not entitled to a res judicata effect. 763 F.2d at 1035.

First, it is clear that in a federal court water adjudication the United States is bound and precluded by the judgment entered there even though the action is not technically a general adjudication. *Arizona V. California, supra,* affected only the mainstream of the lower Colorado, excluded the tributaries, did not join individual water users, particularly those holding presently perfected rights including Indian treaty reserved water rights. Nevertheless, although the proceedings were not final, res judicata effect was given to the decree entered in those proceedings in 1964, even though the decree, in its Article IX, expressly reserved to the court powers of modification in terms far broader than any found in paragraph 20 of the 1945 Judgment, namely:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

103 S. Ct. at 1391.

The Court of Appeals also disregarded citations to its own opinion on point in *United States v. Fallbrook Public Utility District,* 347 F.2d 48, 57, 58, 60 (9th Cir., 1965) which gave binding effect between the parties and their successors to a consent judgment involving less that all of the water rights in

a stream system. That the United States was seeking rather than opposing the binding effect of the jugment there should not be a distinguishing fact. See also *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371 (1910).

The claims before the court in Civil 21 at the time of entry of and settled by the 1945 Judgment included all of the rights of the United States and all other parties to the use of the surface waters of the Yakima River basin. As between the parties, the 1945 Judgment was intended to be and is a general adjudication of res judicata as to all water rights held by them in combination.

c. The Rule of United States' Representation of Indian Interests.

The Court of Appeals suggests that the 1945 Judgment settled only the rights of the irrigation districts made parties to Civil 21. 763 F.2d at 1035, n. 4, totally ignoring any effect of the judgment on its author, the United States. The United States was in the case as trustee and holder of water rights for the Yakima Indians, particularly those rights covered by the 1914 and 1940 Acts.

The United States as trustee was bound as to water rights which it asserted and might have asserted. The 1945 Judgment, thus, precludes claims for additional, treaty reserved water rights for both irrigation and fish life. *Nevada v. United States, supra.*

The participation by the United States in Civil 21 as trustee for the Indians bound the Indians. *Arizona v. California,* 460 U.S. 605, 103 S. Ct. 1382, 1389, 1395, 1396 and n. 20 (1983); *Nevada v. United States,* 462 U.S. 110, 103 S. Ct. 2906 (1983);

Heckman v. United States, 224 U.S. 413 (1911); *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1903)

The Court of Appeals seeks to avoid the res judicata effect of the 1945 Judgment by stating:

> The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation. 762 F.2d at 1034.

Citing paragraph 20 of the judgment.

Paragraph 20, however, does not specifically mention the Yakima Nation or any Indians.

When the judgment was presented, the court was assured that this reference to those "not made parties" was to claimants or users who were not within the jurisdiction of the court in Civil 21. Statement to the Court, p. 9; E.R. 115; Appendix, pp. 109, 110. United States attorney Veeder represented that all the Indian rights were in the Wapato Division. Colloquy with Judge Schwellenback p. 17, App. p. 192.

In view of the history of the project and bitter conflict over Indian rights resolved by the 1914 Act, the specific reference to the 1914 Act in the 1945 Judgment, the pivotal importance of limitation of the first priority Indian treaty water rights to the stability of the project, the indisputable jurisdiction of the District Court as to the United States, the legal precedents as to representation of the Indians by the United States, and the critical importance of the stability of the water rights adjudicated in 1945 to the economy and a large and growing population of the Yakima basin, it is not credible to interpret that clause in Paragraph 20 as excluding the Indian interests, at least some of which are specifically dealt with, from the operation of the judgment.

Paragraph 20 did not contemplate a departure from the fundamental principles of finality so as to permit retrial of Indian rights and interests settled and resolved before the court by the United States and the other parties forty years ago. *See Arizona v. California*. 460 U.S. 605, 103 S. Ct. 1382, 1391-1394 (1983). Finality was intended.

The long-standing and important rule of the binding representation of Indian interests by the United States was not set aside by the judgment entered in 1945.

CONCLUSION

The decisions of this court, and the stability and well-being of a large and important agricultural economy and its people require that the water rights of the Yakima River basin be left in repose. The implications of this case as to other settlements of Western water rights in the earlier years of this century require that the binding effect of the 1945 consent judgment be preserved.

Finally, direction of the lower federal courts to prevent piecemeal water rights adjudications after a remand to state court under the McCarran Amendment is urgently needed.

Respectfully submitted,

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Attorneys for Petitioners
September, 1985

FOOTNOTES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

(1) Yakima Valley Water Management Study, "A Status Report on Water Quality Investigations, Yakima River Basin, Washington, for U.S. Bureau of Reclamation (Contract 14-06-100-9158)" by CH2M Hill, May, 1977. (Herein "Status Report", May, 1977) at page 1.

(2) Status Report, May, 1977, page 10.

(3) "Consequences and Responsibility in Drought Forecasting: The Case of Yakima, 1977." Michael H. Glantz, Environmental & Societal Impacts Group. National Center for Atmospheric Research, March, 1981. (Herein "Consequences"), page 9.

(4) "Status of the Water Resources Planning Program in the Yakima Basin", Robert T. Milhous, October, 1975, Department of Ecology, State of Washington, Olympia, Washington, (Herein "Report No. 24"), Appendix A, page 1; Status Report, May, 1977, page 3.

(5) Report No. 24, Appendix A, page 1.

(6) Report No. 24, Appendix A, page 1.

(7) "Yakima Valley Water Management Study", Washington, Status Report, March, 1977, U.S. Bureau of Reclamation, Pacific Northwest Region, Boise, Idaho, (Herein "Status Report, March, 1977, page 3; Consequences, page 10.

(8) Report No. 24, Appendix A, page 1.

(9) Status Report, May, 1977, page 4.

(10) Status Report, May, 1977, page 21.

(11) Status Report, March, 1977, page 5.

(12) Status Report, May, 1977, page 5.

(13) "C.R. Lentz Review, Yakima Project Water Rights & Related Data", Preliminary Records, United States Department of the Interior, Bureau of Reclamation, Pacific Northwest Region, Yakima Project, Washington, December, 1974. (Herein "Lentz Review") pages 5, 10.

(14) Status Report, May, 1977, page 21.

(15) Status Report, May, 1977, page 7.

(16) Status Report, May, 1977, Map following page 7; Affidavit of Louis B. Hilderbrand dated May 27, 1982 in *Holly v. Totus,* U.S. District Court, Eastern District of Washington, Civil Cause No. C-7802.

(17) In 1902 and 1907, there were an estimated 121,000 acres under irrigation in the Yakima Basin. Status Report, May, 1977, page 4.

(18) Affidavit of Louis B. Hilderbrand, *supra,* page 2.

(19) Report No. 24, page 1.

(20) Consequencs, page 10; "Status of Water Quality in the Yakima Basin from 1976 to 1979", Water Power and Resources Service, Pacific Northwest Region, Boise, Idaho, May, 1980, (Herein "Status Report", May, 1980), page 5.

(21) Crop Production Reports compiled by U.S. Bureau of Reclamation, Yakima Project for 1981.

(22) Status Report, May, 1977, pages 10, 11.

(23) *Ibid.*

(24) Crop Production Reports compiled by U.S. Bureau of Reclamation, Yakima Project for 1981.

(25) "Report on Conditions of the Yakima Indian Reservation, Wash." H.R. Doc. No. 1299, 62d Cong., 3d Sess. (October 22, 1912), page 24 (Herein H. Doc. 1299).

(26) H. Doc. No. 1299, page 15; Letter, December 12, 1905 from E.A. Hitchcock, Secretary of the Interior to Representative W.L. Jones printed in "Impounding Waters and Indian Tuberculosis Sanitarium, Report of the Joint Congressional Commission" S. Doc. No. 337, 63d Cong., 2d Sess. (December 20, 1913) (Herein S. Doc. 337) at pages 341-342.

(27) *Cf.* Ex. 4, Lentz Review, pages 2,3,9.

(28) H. Doc. 1299, page 15; S. Doc. 337, pages 374-375.

(29) H. Doc. 1299, pages 16-17.

(30) U.S. House of Representatives, Document No. 505, December 20, 1913, 63d Cong., 2d Sess., pages 8, 9.

(31) Cong. Rec. July 1, 1914, pages 11467, 11468; Cong. Rec. July 29, 1914, page 12946; House Document No. 1299, 62d Cong., 3d Sess. (Herein H. Doc. 1299).

(32) House Document No. 1304, 62d Cong., 2d Sess. (January 25, 1913 (Herein H. Doc. 1304) esp. pages 5-6.

(33) Indian Appropriation Act of June 30, 1913, Sec. 23, 38 Stat. 100; S. Doc. 337.

(34) Indian Appropriation Act of June 30, 1913, 38 Stat. 100.

(35) "Report and Recommendations of the Joint Commission on Indian Tuberculosis Sanitarium and Yakima Indian Reservation Project" Senate Document No. 337, 63d Cong., 2d Sess., December 20, 1913 (Herein S. Doc. 337); House of Representatives Document No. 505, 63d Cong., 2d Sess., December 20, 1913 (Herein H. Doc. 505).

(36) S. Doc. 337, pages 38, 56, 77, 85-86, 93, 117, 122, 123, 183, 362.

(37) S. Doc. 337, page 24; H. Doc. 505, page 8.

(38) Indian Appropriation Act of 1913, 38 Stat. 100.

(39) H. Doc. No. 505, page 1; S. Doc. 337, page 1.

(40) S. Doc. No. 337, pages 45-47.

(41) H. Doc. No. 1304, pages 5-6; H. Doc. 1299; S. Doc. 337; Cong. Rec., February 25, 1913, page 3901.

(42) S. Doc. No. 337; pages 35-36, 38, 41, 42, 46, 57-58, 69-72, 78-83, 114-117, 136-137, 140-143, 147-150, 356.

(43) Cong. Rec., pages 10595, 10596, 10599, 10653, 10770, 10771, 10773-10789, 10936-10943, 11019-11021, 11023-11029, June 17, 18, 20, 22, 23 and 24, 1914; Cong. Rec., page 12949, July 29, 1914.

(44) S. Doc. No. 337, pages 112-113, 170.

(45) S. Doc. No. 337, page 369.

(46) House of Representatives, 76th Cong. 3d Sess., Report No. 2477, "Wapato Indian Irrigation Project Appropriation for Additional Water, June 7, 1940. (Herein H. Rep. No. 2477), pages 1-2.

(47) H. Rep. N. 2477, pages 2, 4-5.

(48) Ex. 4 Lentz Review, pages 89, 99, 106, 163.

(49) Affidavit of William G. Gray, Superintendent of the Yakima Project filed with the District Court in this case on May 17, 1978.

YAKIMA VALLEY WATER MANAGEMENT STUDY

YAKIMA RIVER BASIN
WASHINGTON

STATUS REPORT
March, 1977

U.S. Bureau of Reclamation,
Pacific Northwest Region
Boise, Idaho

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

UNION GAP IRRIGATION DISTRICT;
YAKIMA-TIETON IRRIGATION DISTRICT;
YAKIMA VALLEY CANAL COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

I, DONALD H. BOND, a member of this bar of this Court hereby certify that three copies of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit," were mailed by first class, postage prepaid mail, on September 12, 1985, to each of the following:

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